

ROY R. CUMMINS

IBLA 76-208

Decided August 17, 1976

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring the Battle Bar placer mining claim null and void ab initio and rejecting a verified statement, OR 9636-A.

Affirmed.

1. Administrative Authority: Estoppel -- Estoppel -- Hearings -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Mining Claims: Lands Subject to -- Rules of Practice: Hearings

The fact that assessment work has been performed on a mining claim does not estop the Government from determining the validity of a claim by proper proceedings giving adequate notice and an opportunity for a hearing where there are disputed determinative facts. However, where the claim was located after land has been withdrawn from mining, it is proper for the Bureau of Land Management to declare a claim null and void ab initio without a hearing.

2. Mining Claims: Lands Subject to -- Mining Claims: Surface Uses -- Mining Claim Rights Restoration Act -- Surface Resources Act: Verified Statement

A verified statement required under section 5 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 613 (1970), is properly rejected when the mining claim in connection with which it is filed, is declared to be null and void ab initio because it was located on land withdrawn from

mineral location for power purposes prior to the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 et seq. (1970), and the land was segregated for purposes other than power development at that time and continuously thereafter.

APPEARANCES: Roy R. Cummins, pro se. 1/

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On January 15, 1973, Roy R. Cummins filed a verified statement in the Oregon State Office, Bureau of Land Management, pursuant to section 5 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 613 (1970). He was claiming rights in the Battle Bar placer mining claim located on January 18, 1939, in section 17, T. 33 S., R. 9 W., Willamette Mer., Oregon.

Section 4 of the Act, 30 U.S.C. § 612 (1970), reserved to the United States Government the right to manage and dispose of the vegetative surface resources and to manage and dispose of other surface resources (except mining deposits subject to location under the mining laws of the United States) of mining claims located after the effective date of the Act.

Section 5, 30 U.S.C. § 613 (1970), established the procedure whereby the United States Government could have a determination made as to the respective rights of the United States and a mining claimant as to surface resources of claims located prior to the Act. The initial step in the procedure is a publication of notice to mining claimants in a designated area that the United States is seeking a determination of surface rights.

The response of a mining claimant who seeks to assert surface rights in a mining claim is to file in the office specified in the notice a verified statement setting forth certain information outlined in section 5 of the Act.

Following the publication of notice by the Oregon State Office, appellant made a timely filing of his verified statement.

1/ While appellant alone signed the combined notice of appeal and statement of reasons, we note that one A. Wade Strowger, Esq., Strowger & Kershner, Portland, Oregon, filed certain return receipt cards showing the appeal was sent to this Board.

Subsequent to appellant's filing of his verified statement, BLM conducted an examination which culminated in a report being filed on December 13, 1974. The report concluded that the Battle Bar placer mining claim was located in 1939 on land that was withdrawn from mineral entry. For that reason, it was recommended that the verified statement be rejected and the claim declared null and void ab initio.

The report stated that the land encompassed by the mining claim is included in five withdrawals. As listed in the report, they are:

- a. SO 12/12/1917 WP Des. 14
- b. EO 12/27/1919 Pwr. S. Res. 728
- c. FPC 0 853 Wdl. Pwr. Proj. 12/2/1927
- d. PLO 1726 Wdl. Rec. Area 9/3/1958-A
- e. OR 4337 Wdl. Nat. Scenic Rivers 2/3/1969

BLM concluded in its decision dated July 31, 1975, that since the land encompassed by the claim was withdrawn from mineral entry at the time of location, the claim was null and void ab initio and the verified statement was rejected.

On appeal appellant makes the following arguments:

1. BLM erroneously located the claim because it referred to the claim as straddling the Rogue River and appellant "believes" the claim does not straddle the river. Therefore, the decision is ineffectual because it does not definitely locate the property.
2. The Government is estopped from declaring the claim null and void ab initio because it has acquiesced for many years in appellant's ownership rights.
3. The BLM decision constitutes a taking without just compensation, and, therefore, it is unconstitutional and lacking in due process.
4. The withdrawals have been superseded by current legislation such as the "Wild Rivers Act" and various wilderness acts. Therefore, the power withdrawals are void ab initio by reason of overriding current legislation.

[1] Appellant's arguments exhibit a lack of understanding of the mining law. Until a patent is issued, the legal title to a mining claim remains with the United States. The Department of the Interior is empowered, after proper notice and adequate hearing, to determine the validity of an unpatented mining claim. United States v. Cameron, 252 U.S. 450 (1920). The fact that appellant held the claim

for many years and may have performed the necessary assessment work did not create any rights as against the Government. Therefore, it cannot be said that the Government is estopped from determining the validity of the claim. See United States v. Consolidated Mines & Smelting Co., Ltd., 455 F.2d 432 (9th Cir. 1971).

Appellant asserts that he was deprived of property without due process of law and without just compensation. Such an argument is without merit. Due process requires notice and, where determinative facts are in dispute, an opportunity for a hearing. However, in this case the records of the Department clearly show that the land embraced by the claim was withdrawn from mineral entry at the time of purported location in 1939. A mining claim located on lands withdrawn from mineral location is properly declared null and void ab initio without a hearing. United States v. Consolidated Mines & Smelting Co., Ltd., *supra*; Mickey G. Shaulis, 11 IBLA 116 (1973); Norman A. Whittaker, 8 IBLA 17 (1972).

Such a determination is possible only if there is no dispute as to the record facts which support the declaration. Brace C. Curtiss, 11 IBLA 30 (1973). Although appellant claims that BLM does not actually know the on-ground location of the claim and that the withdrawals have been superseded by subsequent legislation, the facts of record are clear that mineral entry of the land was foreclosed at the time appellant's claim was located.

Appellant has supplied no evidence that BLM's on-ground location of his claim is in error other than his belief that such is the case. Absence evidence to the contrary, we have no reason to dispute BLM's platting of the claim as straddling the Rogue River, or, at least, as being adjacent to or near the river in section 17 and in the area covered by the withdrawals.

[2] Appellant has claimed that current legislation has superseded the power withdrawals. With certain exceptions, the Mining Claims Rights Restoration Act of August 11, 1955, 30 U.S.C. § 621 *et seq.* (1970), opened to mineral location and patent lands within power withdrawals with a reservation to the United States of power rights in the land. However, the Act did not validate mining claims located on lands subject to a power site withdrawal prior to the effective date of the Act, *i.e.*, August 11, 1955. Beverly Trull, 25 IBLA 157 (1976); Gardner C. McFarland, 8 IBLA 56 (1972). Therefore, the claim at issue was void ab initio when it was located in 1939 for lands within the power site withdrawal.

If the land status were only affected by the power withdrawals, it is possible that a mining claim could have been relocated after the Mining Claims Rights Restoration Act of August 11, 1955, in

accordance with the provisions of that Act or by holding the claim for the requisite time pursuant to 30 U.S.C. § 38 (1970), assuming a discovery was effectuated. Gardner C. McFarland, *supra*. However, section 2 of the Mining Claims Rights Restoration Act provides that nothing in the Act "shall affect the validity of withdrawals or reservations for purposes other than power development." 30 U.S.C. § 621(c)(1970).

The record reveals that the land has been affected by other withdrawals. We need discuss only one which effectually bars the inception of any rights in the subject claim by a mining claimant after the Mining Claims Rights Restoration Act. On September 3, 1958, Public Land Order 1726 withdrew from all forms of appropriation under the public land laws, including the mining laws, lands in section 17, T. 33 S., R. 9 W., Willamette Meridian, and other lands for the protection and preservation of scenic and recreation areas adjacent to the Rogue River and its tributaries. 23 F.R. 7002-03. A notation in the record indicates that the application for this withdrawal (Oregon 03791) was filed in the Oregon BLM Office on November 11, 1954. Regulations in effect at that time, 43 CFR 295.10 (1954), and still in effect, but renumbered, 43 CFR 2091.2-5(a), provide that the recording in the serial register and the noting on the official plats and tract books of the Bureau office for the area, indicating that an application for the withdrawal or reservation of lands has been received from a federal or state agency, shall:

* * * temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal.

Because the subsequently effectuated withdrawal barred locations under the mining laws, pursuant to the above-quoted regulation, the segregative effect of that withdrawal relates back to the noting of the application on the Bureau records. Thus, the land was segregated from mining location on the date of the Mining Claims Rights Restoration Act and has been continuously since that time. Therefore, neither that Act nor any other act has opened these lands to mining location. 2/ Thus, appellant's claim was properly declared null and void ab initio,

2/ Even if the land had not been segregated from the date of the Mining Rights Restoration Act to the date of the 1958 withdrawal, there is no indication that appellant relocated the claim during that hiatus, nor would that time be a sufficient holding under the Oregon statute of limitations to meet requirements of 30 U.S.C. § 38 (1970).

and the verified statement filed in connection with the claim was properly rejected. See Estate of Thomas S. Williams, Deceased, 10 IBLA 138 (1973).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge

